IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.73 OF 2004

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M/s G.K. Builders ...Petitioner

v/s.

M/s.Mantri Capital Services Ltd. & anr. ...Respondents

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Mr.Ravi Kadam with Mr.B.B. Saraf i/b Ranjit & Co. for the Petitioner.

Mr.Arif Bookwala i/b Ms.Saira Mirzankar for Respondent No.1.

Mr.D.D. Madon i/b Bidah Chandra for Respondent No.2.

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CORAM: D.K.DESHMUKH, J.

DATED: 4TH AUGUST,2005

P.C.:

1. By this petition filed under Section 34 of the Arbitration Act, the award made by the sole arbitrator dated 21-10-2003 directing the Petitioner to pay an amount of Rs.1,55,72,603/- with interest is challenged.

2. The basic challenge to the award is that the arbitrator in the award has stated that the Petitioner has not filed any statement of defence though ample opportunity was given to the Petitioner to file the reply. According to the Petitioner, a reply was sent to the arbitrator by fax dated 16th August, 2003. In that reply objection as to the bias of the arbitration was raised and some defences on merit were also raised. It is submitted that a statement of defence was also sent by speed post, but the arbitrator refused to accept the same. According to the Petitioner, the arbitrator in the affidavit filed in this petition has stated that the matter was fixed on 18th August, 2003 by the arbitrator for cross-examination of the witnesses of the Respondent. But the Petitioner did not appear before the learned arbitrator on 18-8-2003. In stead on 16-8-2003 they

faxed their reply where they raised the contentions which were already rejected by the learned arbitrator. In his affidavit, the arbitrator says that he refused to accept the reply sent by post, because that reply was the same as was the reply sent by fax. The learned Counsel appearing for the Petitioner submits that even according to affidavit filed by the arbitrator the matter was fixed before the arbitrator on 18th August, 2003 for cross-examination by the Petitioner of the witnesses of the Respondent. Before that date the Petitioner sent a reply by fax on 16-8-2003. According to the Petitioner, a statement made in the affidavit that the reply contained the same points which were rejected by the arbitrator earlier is not correct. In any case the fact that the reply by fax was received by the arbitrator which shows that the observations made by the arbitrator in the award that no statement of defence was filed is incorrect. It is further stated that the statement made in the affidavit that he refused to accept the envelope which contained the reply of the Petitioner, because the envelope contained the same reply which was sent by fax discloses the biased mind of the arbitrator. It is further submitted that by the fax an objection to the continuation of the arbitrator as such was raised on the ground that the arbitrator had taken a

loan of Rs.1 crore from the Petitioner and because the Petitioner started demanding the amount back, the arbitrator was biased against the Petitioner. That objection has nowhere been decided by the learned arbitrator. It is submitted that an objection raised to the continuation of the arbitrator on the ground of bias is required to be decided by the arbitrator by a reasoned order.

3. On behalf of the Respondent, on the other hand, it is submitted that objections to the jurisdiction of the arbitrator were raised by letter dated 28-8-2002. Those objections were decided by the arbitrator by first order dated 29-8-2002. That order has not been challenged in this petition and therefore that order has become final and therefore the award cannot be challenged on that ground. It is further submitted that comparison of the reply sent by fax and the reply sent by post, copies of which are produced with the petition, shows that they are the same. Therefore, it cannot be said that the statement made by the arbitrator discloses bias of the learned arbitrator. It is further submitted that the Petitioner has not participated in the arbitration proceedings. The arbitrator has decided the objections and merely because he has not given reason for rejecting one of the objections, the award

cannot be set aside solely for that reason.

4. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that the submissions made on behalf of the Respondent as also observations in the award that all the objections which were raised by the reply which was sent by fax were already rejected by the arbitrator is not correct. The only order relied on before me deciding the objection raised by the Petitioner is the order dated 29th August, 2002. Perusal of that order dated 29-8-2002 shows that the order refers to two letters, one is dated 16th July, 2002 and the other is dated 28-8-2002. Perusal of the letter dated 28-8-2002 shows that by that letter nothing new is stated. What is stated is that the Petitioner reaffirms whatever is contained in the letter dated 16th July, 2002. Perusal of the letter dated 16th July, 2002 shows that in that letter no objection to the continuation of the arbitrator, on the ground that he has taken loan of Rs.1 crore from the Petitioner and he has turned against the Petitioner because the Petitioner is taking steps to recover the loan, is raised. It appears that, that objection was for the first time raised in the fax dated 16-8-2003. As the objection to the continuation of the arbitrator on the ground aforesaid was not raised, in

the letter dated 16-7-2002, there is no question of that objection being already decided by the learned arbitrator by order dated 29-8-2002. Therefore, minimum that can be said is that the objection to the continuation of the arbitrator on the ground of the loan taken by him was raised for the first time by the fax dated 16-8-2003. Perusal of the provisions of Section 13(3) of the Act shows that there is a duty casts on the arbitrator to decide every challenge raised to his appointment or continuation as an arbitrator on the ground of bias. Section 31 also casts duty on the arbitrator to disclose reasons for his decision. Thus, there was a duty cast on the arbitrator by the Act to decide the challenge and to disclose the reason for deciding that challenge. The submissions made on behalf of the Respondent that all the challenges have been decided by order dated 29-8-2002 including the challenges on the aforesaid ground cannot be accepted because clearly the challenge raised in the fax has not been decided by the arbitrator as that challenge was for the first time raised in the fax, and therefore, in my opinion, the award made by the arbitrator without deciding the challenge is contrary to the provisions of sub-section 3 of Section 13 of the Act.

5. So far as the contention raised on behalf of the

Petitioner that because the order dated 29th August, 2003 has not been challenged it has become final is concerned, in my opinion the argument is not well founded. Perusal of provisions of sub-section 5 of Section 13 shows that when a challenge is rejected the arbitrator can proceed further and make an award and what is to be challenged by the party aggrieved is the award under Section 34 because of the provisions of Section 13 one of the challenges available to the aggrieved party for challenging the award is that the award is vitiated because of bias. Perusal of the provisions of Section 34 shows that section 34 by itself does not provide that an award can be set aside for the reason that the arbitrator was biased. For challenging the award that ground becomes available to the aggrieved party only because of the provisions of Sections 12 & 13. Therefore, basically what is to be challenged under Section 34 is the award and in the petition if a ground is raised that the award is vitiated because of bias, in my opinion, would be sufficient for the court to look into the validity of the order passed by the arbitrator rejecting challenge to the appointment or continuation of the arbitrator on the ground of bias. In the present case, however, I find that though there was a challenge raised to his continuation as arbitrator there was no decision of the arbitrator on

the challenge. It amounts to arbitrator not following or committing the breach of the provisions of sub-section 3 of Section 13 of the Arbitration Act and therefore, in my opinion, for this sole reason the award is liable to be set aside.

6. It is further to be seen here that perusal of the award shows that in the award the arbitrator does not refer either to the reply sent by fax or the reply sent by post. The only statement to be found in the award is that the Petitioner has not filed any statement of defence though ample opportunities were given to the Petitioner. In the affidavit filed by the arbitrator in this petition, the arbitrator states thus"

> "The Petitioners did send me a copy of the so called reply by fax on 16th August, 2003 as alleged by them in their Petition. But as I had already adjourned the proceedings to 18th August, 2003 after giving final opportunity to the Petitioners I expected the Petitioners to cross- examine the Respondent/ claimants and tender their reply to me on the date fixed for hearing after serving a copy of the same on the

Respondent herein. But the Petitioners failed to appear on the date fixed for hearing. They also failed to produce any evidence as to the service of their reply on the Respondent No.1 herein. Moreover the allegations contained in the letter faxed to me dated 16-8-2003 contained the same plea, which they had raised in their earlier letters and the same were rejected by me."

7. Perusal of the above quoted statements shows that by the date on which the reply by fax was received, the arbitration proceedings were not closed. On the contrary they were fixed on 18-8-2003, when the fax was admittedly received by the arbitrator on 16-8-2003. In his affidavit he states that the reply sent by fax contained the same challenges which were rejected by him earlier. This statement is also factually incorrect, because the statement of defence sent by fax contained entirely new challenge. In the same paragraph of the reply, so far as the reply sent by post is concerned, the arbitrator states thus:

"In so far the allegation of refusal of the

reply by speed post is concerned, the same was refused by me for the reason that it was nothing but a copy of the faxed material."

8. One fails to understand how the arbitrator could have found without opening the envelope that the reply contained in the envelope is the same as the one which is sent by fax. It was possible for the arbitrator to say that the reply sent by fax and the reply sent by speed post is the same, only if the arbitrator had received the envelope, opened it, read the reply and compared it to the reply received by fax. In my opinion, the fact that the arbitrator can go to the length of making such an absurd claim in an affidavit on oath discloses that the arbitrator was definitely biased against the Petitioner and is willing to go to any length to help the Respondent.

9. For all these reasons, therefore, in my opinion, the award is liable to be set aside.

10. In the result, therefore, the petition succeeds and is allowed. Award impugned in the petition is set aside. Respondent No.1 is directed to pay costs

of this petition to the Petitioner as incurred by the Petitioner.

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